

1                   UNITED STATES DISTRICT COURT  
2                   EASTERN DISTRICT OF MICHIGAN  
3                   SOUTHERN DIVISION

4                   USAMA J. HAMAMA, et al.,

5                   Petitioners and Plaintiffs,

6                   -v-

Case No. 17-cv-11910

7                   REBECCA ADDUCCI, et al.,

8                   Respondents and Defendants.

9                   /

10                  PETITIONERS/PLAINTIFFS' MOTION FOR EXPEDITED BRIEFING SCHEDULE  
11                  FOR PLAINTIFFS/PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION  
12                  AND TO EXTEND ORDER STAYING REMOVAL

13                  BEFORE THE HONORABLE MARK A. GOLDSMITH

14                  Detroit, Michigan, Wednesday, July 5th, 2017.

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1                   Detroit, Michigan.

2                   Wednesday, July 5th, 2017.

3                   At or about 11:43 a.m.

4                   --        ---        --

5                   THE CLERK OF THE COURT: Please rise. The United  
6 States District Court for the Eastern District of Michigan is  
7 now in session, the Honorable Mark Goldsmith presiding. You  
8 may be seated.

9                   The Court calls case number 17-11910, Hamama versus  
10 Adducci. Counsel, please state your appearances for the  
11 record.

12                  MS. SCHLANGER: Good morning, your Honor. I'm Margo  
13 Schlanger here for the petitioners and plaintiffs.

14                  MR. GELERNT: Good morning, your Honor. Lee Gelernt  
15 from the ACLU for petitioners/plaintiffs.

16                  MR. STEINBERG: Michael J. Steinberg on behalf of the  
17 petitioners and the plaintiffs.

18                  MS. SCOTT: Kimberly Scott from Miller Canfield on  
19 behalf of the plaintiffs/petitioners.

20                  MR. SWOR: William Swor on behalf of the  
21 plaintiffs/petitioners.

22                  MR. FLENTJE: August Flentje on behalf of the  
23 respondent.

24                  MR. SILVIS: William Silvis on behalf of the  
25 respondent.

1 MS. PINCHECK: Catherine Pincheck on behalf of the  
2 respondent, your Honor.

3 MS. NEWBY: Jennifer Newby on behalf of the  
4 respondent.

5 THE COURT: All right. Good morning, everybody. I  
6 hope everyone had a glorious July the 4th. I suppose some of  
7 you were working on that day. I know we were. I do want to  
8 take a moment and thank one my law clerks, Daniel Ping, for  
9 taking time away from his holiday to help us get ready for  
10 today's hearing and another clerk who's not in the courtroom,  
11 Josh Zeman, also was helping out as well from a remote  
12 location. I thank them all as I thank all my staff for always  
13 coming forward and offering to work beyond the regular business  
14 hours. Mr. Yarbrough has done that on numerous occasions. I  
15 thank him as well.

16 All right. We're going to get started with the  
17 motions that the plaintiffs filed. They want expedited  
18 briefing on a forthcoming motion for a preliminary injunction,  
19 want to extend the stay as well and also want some discovery,  
20 so we'll start with the plaintiffs. Ms. Schlanger, you going  
21 to lead off?

22 MS. SCHLANGER: Thank you, your Honor. As you said,  
23 these are motions to extend the stay, the existing stay of  
24 removal until there's time for this Court to adjudicate a  
25 preliminary injunction motion that we intend to file very

1 shortly and to expedite some discovery prior to that and prior  
2 to the Rule 26F conference.

3 On the extension on the stay of removal, you have  
4 ample authority do this under the rules governing TROs. The  
5 standard is good cause and the case law tells us that good  
6 cause means that the existence of the emergency that caused the  
7 original grant still remains and absolutely that does remain.  
8 The danger in Iraq hasn't lessened. The class members continue  
9 to face very significant hurdles in getting counsel and getting  
10 their motions to reopen filed and heard although we continue to  
11 work diligently on making that happen. Umm --

12 THE COURT: Let me interrupt four a second because I  
13 want to understand the forthcoming motion for a preliminary  
14 injunction that you want to file. Is it going to introduce any  
15 issues that we haven't already addressed?

16 MS. SCHLANGER: Well, it will be fuller briefing on  
17 the merits your Honor and if you needed fuller briefing, we're  
18 happy to do a sort of more methodical and fuller briefing on  
19 jurisdiction and my colleague, Lee Gelernt, is here to talk  
20 about that today as well if that's what you want to do with  
21 this hearing.

22 THE COURT: Well, when you say the merits, tell me  
23 what you plan on addressing in the preliminary injunction  
24 motion on the merits.

25 MS. SCHLANGER: We'll address the, umm, we've

1 asserted a claim for a stay of removal under CAT, the INA and  
2 the due process clause and so I mean those three claims.

3 Mostly CAT and the due process clause to be frank.

4 THE COURT: All right. Are you going to get into why  
5 those sources of law require that removal not take place under  
6 these circumstances?

7 MS. SCHLANGER: Yes, exactly. So not, not in any  
8 individual --

9 THE COURT: In a general matter because you're not  
10 going to apply it to obviously every member of the class.

11 MS. SCHLANGER: That's right. So as a general matter  
12 we're going to brief the argument that this hurry to  
13 deportation in light of the very obvious dangers in Iraq and in  
14 light of the staleness of the existing findings that underlay  
15 orders of removal, that that would be illegal under both CAT  
16 and the due process clause and so we're going brief that issue  
17 under both of those.

18 THE COURT: Okay.

19 MS. SCHLANGER: We'll also be planning to file, you  
20 know, just very shortly thereafter because I think you'll need  
21 it, a motion for class certification since this is a class --  
22 since we've asserted class allegations so we need to get all of  
23 that briefed and in front of you and the need for a stay  
24 preserving the status quo remains an emergency situation. We  
25 have been continuing to work to get counsel lined up with the

1 class members and that is, umm, that is made more difficult by  
2 their detention, by their transfers and by the communications  
3 obstacles that come with detention and transfers. For example,  
4 we just found out yesterday -- no, I think it was the day  
5 before, I think it was the day before the holiday that we found  
6 out that for four or five days, there has been no phone access  
7 for a large number of the class members. They haven't been  
8 able to call their families and so we knew we were having  
9 trouble finding things out, but we just found out that their  
10 phone service had been cut off in a particular detention  
11 facility where they are. The point is not so much the details  
12 of that, is that there are real obstacles to making this all  
13 happen. We're working diligently through them to try to get  
14 people lawyers, to try to get the motions to reopen filed, but  
15 in the meantime there is this emergency need for more time,  
16 that remains true and so --

17 THE COURT: Well, let me ask you. If I were to agree  
18 with you that more time should be put on a clock, the  
19 government's view of this is that if I do find I don't have  
20 jurisdiction, that's the end of the ball game on the counts  
21 that have to do with the removal orders. I assume you still  
22 have other claims that might need to be dealt with like the  
23 detention issue, but let me talk about that with you later.  
24 The government's point is if I agree with the government on  
25 jurisdiction, that's it as far as the removal goes. If I

1 agreed with you on jurisdiction, the government says I could at  
2 that point entertain entry of proper orders which I assume  
3 might include allowing for enough time for class members to get  
4 lawyers or to be contacted to determine if they need lawyers,  
5 so why wouldn't that be a workable solution, extending the stay  
6 for whatever period I might deem reasonable until I can make my  
7 ruling on jurisdiction and if I did side with you, then an  
8 order could be crafted to deal with many of the issues that  
9 you're raising now in these two motions, for example, the class  
10 information you're seeking. Couldn't I at that point enter an  
11 order for discovery regarding class information so that  
12 detainees or potential arrestees would be able to get in  
13 contact with class counsel or class counsel could get in  
14 contact with them to arrange for motions for reopening?

15 MS. SCHLANGER: Yes, your Honor. I think if you say  
16 that you have jurisdiction, at some point that becomes an  
17 appealable order and you'll have to talk to the government  
18 about whether they would intend to appeal it. If there was a  
19 way for us to work out a stay pending that kind of resolution  
20 and communication and so on, we would be very happy with that.

21 THE COURT: Explain a little bit more what you mean  
22 by that.

23 MS. SCHLANGER: Well, umm, I think if, if you grant a  
24 stay on a finding that you have jurisdiction which of course is  
25 what we think you should do, while that is in a TRO posture,

1       that's not an appealable order, but when it becomes a more  
2 permanent kind of an injunction, I imagine that the government  
3 would seek to appeal it and we would then need a stay of  
4 removal pending that appeal while we worked out the rest of  
5 this stuff. I mean, the thing that we care about is not having  
6 our class members deported to Iraq where they'll be in harm's  
7 way prior to adjudication. That's the thing that we're after,  
8 but we're open to many different ways to arrange that, but the  
9 one that you just sketched out would be fine with us so long as  
10 there was a stay on their removal pending whatever appeal the  
11 government might plan to do of whatever order existed.

12           THE COURT: Well, that's getting us a little further  
13 down the road, but if whatever order I entered became  
14 appealable, I suppose in the first instance I would be asked I  
15 suppose to keep whatever order I had previously entered in  
16 place. I'm trying to work the decision tree here both ways,  
17 but I assume someone's going to ask me to keep the stay in  
18 place no matter what I do on jurisdiction, right?

19           MS. SCHLANGER: Yes, sir.

20           THE COURT: And then I assume if somebody's unhappy,  
21 wants to go to the Court of Appeals, the Court of Appeals might  
22 be asked to either dissolve any stay I had granted or enter a  
23 stay if I had refused to enter a stay, right?

24           MS. SCHLANGER: Yes, I imagine that's right.

25           THE COURT: All right.

1 MS. SCHLANGER: So what we're proposing at this point  
2 is that you extend the TRO for there to be time for that fuller  
3 briefing and we think you have ample authority to do that.

4 As you mentioned, we're also asking for expedited  
5 discovery than expedited discovery which is really very limited  
6 is before the Rule 26F conference obviously, but it's in a  
7 preliminary injunction posture which means that it's under the,  
8 the advisory committee explained that that's pretty routine and  
9 it's in your discretion for good cause shown and we know that  
10 the government when they come in and you ask them questions,  
11 they answer the questions about various things that we don't  
12 know because we haven't been able to get the discovery yet and  
13 so, you know, they'll, perhaps they'll tell you today how many  
14 people there are in various places and what their situations  
15 are and how many of them have motions to reopen. I don't know  
16 what they'll tell you, but we don't know the answer to those  
17 questions and those would be very useful as we're trying to put  
18 you in a position to adjudicate this fairly and as we're trying  
19 to make out our claim.

20 THE COURT: Well, that's what I'm trying to  
21 understand, what purpose right now would this information  
22 serve. In terms of the class dimension to the case, you're  
23 seeking to represent a class based on Federal Rules of Civil  
24 Procedure 23 (b) (2), right?

25 MS. SCHLANGER: Correct.

1                   THE COURT: So all you need to show is that the  
2 government's generally acting in a uniform way against class  
3 members. I'm not prejudging this issue, but you have at least  
4 in theory laid out that argument already, that the government  
5 has a policy of enforcing these orders against class members,  
6 many of whom you say and perhaps all of whom you say could  
7 assert these arguments under CAT or persecution provisions of  
8 INA. Why would you need any more information along the lines  
9 you're asking for to establish the prerequisites for a class  
10 certification?

11                  MS. SCHLANGER: Right, so one of the things that we  
12 would like to know is when was their last adjudication, when  
13 was their final order entered so that we have some sense of,  
14 umm, we already have an educated sense, but we don't have a  
15 full sense of how stale those orders are so that we can, umm,  
16 we think explain to you more persuasively how the changed  
17 country condition issues might work.

18                  The other thing is that we also have been alleging  
19 that their detention is getting in the way of, umm, of  
20 obtaining representation and actually acting without  
21 representation to file motions to reopen and knowing that we've  
22 asked for their transfer history so that we can make that part  
23 out, too, so we're really not asking for very much. We've  
24 asked for their date of their final order, criminal history, if  
25 they have a lawyer, whether a motion to reopen has been filed,

1 where they are now and the detention locations where they've  
2 been. I mean, it's not a lot of information -- oh, and, and,  
3 umm, contact information for families so that we can try to  
4 flush out the circumstances a little bit more, so it's not a  
5 lot of information that we're asking for, but it's directed at  
6 those parts of the, umm, of the briefing that we hope to do for  
7 you where we can tell you with a little bit more definitiveness  
8 exactly what these obstacles have been and tell you that it's  
9 not just a few that are stale, that it's the bulk of the class  
10 we think, maybe it's all of the class. We don't, we don't  
11 know. We haven't gotten that discovery yet. I guess I'd just  
12 want to point out again these are the kinds of questions that  
13 you've been asking the government and we think appropriately so  
14 and we would just like to be able to answer them as well. We'd  
15 like to know the answers, too, and it has to do as you say with  
16 the class, umm, part of the case. So I think that's what I  
17 have for starters and unless there are other questions and of  
18 course there may be more later.

19 THE COURT: Well, I do have a question regarding the  
20 date you expect to be able to file a motion for preliminary  
21 injunction. I think you said July 14?

22 MS. SCHLANGER: Yes.

23 THE COURT: Is that still a good date?

24 MS. SCHLANGER: Yes, it is.

25 THE COURT: All right, but you would need the

1 government's information pretty quickly then to put that in a  
2 motion.

3 MS. SCHLANGER: We've asked for it by the 10th. I  
4 think this is all information that's very readily available to  
5 them, that they don't have to go digging around in any files to  
6 get it, but yes, we've asked for it by the 10th and then we  
7 would incorporate it very quickly.

8 THE COURT: Well, does the detention issue that  
9 you've raised in your initial habeas petition and your amended  
10 petition Complaint impact at all on what we're deciding now or  
11 is that a matter that you envisioned being entirely  
12 independent? How do you envision that being processed in this  
13 case?

14 MS. SCHLANGER: You mean the request for release from  
15 detention that's in the Complaint?

16 THE COURT: Yes. You have a detention claim, right?

17 MS. SCHLANGER: So in the preliminary injunction, we  
18 are likely to come back to you and ask you for a transfer order  
19 to get ICE to transfer detainees back to where they can most  
20 effectively communicate with their counsel and the like. That  
21 was also in the initial Complaint.

22 On the release from detention, the argument -- if it  
23 becomes the case that there is not an impending removal for  
24 these detainees, then it becomes the case that under existing  
25 case law they should be released from detention on an

1 individualized kind of a hearing that, umm, where they can  
2 demonstrate that they're not a danger to the community and the  
3 like, but --

4 THE COURT: You mean by impending removal, you'd want  
5 the government to announce that even though they haven't  
6 arrested somebody, they're planning on moving against Mr. A or  
7 Ms. B?

8 MS. SCHLANGER: Oh, no. I meant the people in  
9 detention, your Honor.

10 THE COURT: In detention.

11 MS. SCHLANGER: In detention, yes.

12 THE COURT: Okay, all right.

13 MS. SCHLANGER: So it's not really ripe yet until  
14 these other matters kind of mature a little bit.

15 THE COURT: So that's something we can put to the  
16 side in terms of the issues we're considering now?

17 MS. SCHLANGER: Yes, your Honor.

18 THE COURT: Okay. All right, to circle back then to  
19 the issue I raised before, if my opinion then is to agree with  
20 you on jurisdiction, is the form of the order you're thinking I  
21 should be entering something along the lines of a TRO extending  
22 the stay finding jurisdiction and setting a date for a  
23 preliminary injunction to be filed and some discovery to take  
24 place before that?

25 MS. SCHLANGER: That's one option. A different

1 option I suppose is that you could enter it in a -- you could  
2 enter a stay of removal that's longer lasting without PI  
3 briefing and then I think that would be, umm, if it extended a  
4 fairly long way into the future, you know, a matter of months,  
5 it would be an appealable order and I suppose we could then go  
6 up to the Sixth Circuit if the government wanted to on  
7 jurisdiction only, but while the case remains in the district  
8 court, yes, it's our intention to file that PI and that would  
9 be the kind of order that we would ask for, but we're not  
10 averse to litigating jurisdiction in the Sixth Circuit, but our  
11 preference is to be able to, umm, you extend it, we brief it  
12 more fully, we do a preliminary injunction hearing.

13 THE COURT: Okay. All right. We'll hear from the  
14 government then.

15 MR. FLENTJE: Thank you, your Honor. August Flentje  
16 with the Department of Justice. I guess I'll talk about the  
17 extension of the TRO motion first if that's okay? Our position  
18 is that Rule 65 allows one 14-day extension of a TRO for good  
19 cause, so the request to extend if it's considered should not  
20 go beyond the additional 14 days.

21 We also think the Court should address its  
22 jurisdiction before extending the motion -- excuse me, before  
23 extending the TRO and I think I'd like to point the Court out  
24 to Munaf v. Geren, the Supreme Court decision from about a  
25 decade ago that said that at least with respect to a PI and our

1 view is if the TRO extends beyond an additional 14 days, it  
2 would be the equivalent of a PI, especially if it extends  
3 without an end date which is what plaintiffs have proposed.  
4 The Court said there that it's an abuse of discretion to grant  
5 a PI on the view that jurisdictional issues are difficult. So  
6 I think the Supreme Court's spoken pretty clearly that the  
7 Court will need to address jurisdiction before it gets, it  
8 enters an order that would be the equivalent of a PI.

9                 The plaintiffs cited several cases about, you know,  
10 courts entering TROs or in these kinds of circumstances, but  
11 most of those courts were pretty quickly dissolving them  
12 because they realized they lacked jurisdiction and Kumar is one  
13 of those cases where the Court dissolved the TRO in four days  
14 concluding it lacked jurisdiction and there are some others  
15 where they were in place longer, but it's not clear when,  
16 whether the parties were fighting about the extension of the  
17 order in that, in those circumstances.

18                 As far as an expedited briefing schedule, we were  
19 happy to discuss with plaintiffs an expedited PI briefing  
20 schedule. I'm not sure I have an exact date that I can sign  
21 off on at this moment, but I could probably get something today  
22 if, if the Court wants to talk about expedited briefing.

23                 Talking briefly about the discovery, our position on  
24 the discovery is that again, you know, jurisdiction ought to be  
25 sorted out before we get into discovery. Plaintiffs haven't

1       said that the discovery is necessary to resolve jurisdiction  
2       and it isn't. Plaintiffs haven't provided a lot of explanation  
3       as to how discovery's going to help them with their PI motion.  
4       My sense is the PI -- the -- what they're asking for is sort of  
5       time so that they can use the appropriate process and I really  
6       think the plaintiffs, you know, fundamentally agree that the  
7       right process is the BIA, the immigration court process with  
8       review in the Court of Appeals. They've said that if there's,  
9       there's an adequate ability to use the, utilize that process,  
10      that likely provides the due process that's necessary and the  
11      Sixth Circuit in the, I think it's Moonah -- Muka case, said  
12      that that was an adequate process in a suspension-clause-type  
13      challenge. So, you know, we, we think that's the right process  
14      to use.

15           I think, you know, many of the petitioners, the  
16       original class members have filed motions to reopen. The  
17       latest numbers that I have are that 93 have filed them out of  
18       of around 220 who are detained. A lot of them have sought  
19       stays; some of them have gotten stays. Obviously this Court's  
20       order has released the pressure a little on that, but we think  
21       the proper place to seek a stay or to seek a relief is in that  
22       process and as this Court is thinking about extending its TRO,  
23       I think it's important that there's got to be good cause to  
24       extend it even another 14 days and with, with some portions of  
25       the potential class, there is not that good cause. Plaintiffs

1 had said the whole purpose of this suit is to give these  
2 petitioners a chance to seek relief in the immigration courts  
3 so this shouldn't -- the Court shouldn't enter a TRO for  
4 petitioners who have already been able to utilize that process.  
5 Someone who has filed a motion to reopen is in the proper place  
6 to seek a stay and to seek relief on the merits. That is the  
7 court that is most familiar with the facts, that can look at  
8 the individual circumstances presented both on issues with  
9 regarding harm or stay and with potential relief on the merits  
10 either under CAT or under other remove -- other relief from a  
11 removal provision, so we strong -- our strong view is that if  
12 this Court extends the TRO, it should not apply the TRO to  
13 people who have been able to file motions to reopen.

14 We also think that sort of the kernel of their claim  
15 is that counsel can't get to these folks fast enough. They've  
16 talked about a few detainees being moved to different  
17 facilities. I don't know if that's a lot. I do know that the  
18 folks that are at Youngstown, they're still there is my  
19 understanding so they haven't been moved around and so our  
20 other point on extending the TRO is that there is not good  
21 cause to extend the TRO for people who have counsel. If they  
22 have their own counsel, that counsel is fully capable of  
23 utilizing the appropriate procedures to seek a stay. You know,  
24 there's the immigration courts which are kind of the gold  
25 standard in addressing these kinds of issues, CAT claims,

1       asylum, withholding of removal. That is what they do every  
2       day. You have the backstop of the Courts of Appeals which is  
3       there to correct errors, which is also there potentially  
4       available if the Board is not moving quickly enough, but they  
5       have not made any -- they have no claim in this -- they've made  
6       no claim here that once an alien has counsel and has access to  
7       a motion to reopen, there is any reason for this Court to  
8       impose itself on that process and Congress was quite clear in  
9       1252(b)(9) as to the merits of a removal order and 1252(g) as  
10      to execution of a removal order that the federal district  
11      courts and habeas courts are not the proper place for that kind  
12      of review and they have talked about CAT claims a fair amount  
13      and Congress further made clear that in 1252(a)(4) that the  
14      rights under the CAT arise only in the immigration proceedings;  
15      in other words, the proceedings before the Board of immigration  
16      appeals or the immigration judges.

17           I think we made some arguments in our papers as to  
18      why the injunction should be -- the TRO should be more narrow.  
19      I'm not going to go over these again here, but, you know, we  
20      stand by those arguments with respect to extending the TRO.

21           I'd like to cite one case from the Third Circuit.  
22      It's called -- excuse me, Kaan (phonetic) and that's an example  
23      of where the court, and I have the actual cite, I'm sorry.  
24      There, that's a -- if you read that case, that's an example of  
25      where the Board and the Third Circuit acted very quickly in

1           exigent circumstances so, you know, that would reaffirm our  
2           point that if this Court is going to extend the TRO, it  
3           certainly shouldn't apply it to folks who have filed motions to  
4           reopen or who have counsel.

5           THE COURT: Is it your view I can extend it for 14  
6           days from July 10th?

7           MR. FLENTJE: Yes. I mean, technically the narrower  
8           TRO would have expired tomorrow and, but we're -- we think that  
9           for cause, extending the TRO from the 10th. Now we oppose  
10          that, obviously after explaining --

11          THE COURT: No, I understand. I just wanted to  
12          understand the government's position though because you said I  
13          could extend it for on 14-day period. I just want to know how  
14          you're calculating that. The expanded class, I think everyone  
15          agrees, there the time based on the second order I entered  
16          would be July 14 and in that order I included everybody, the  
17          initial class and then the expanded class. It's the  
18          government's view I could extend the stay order 14 days beyond  
19          July 10?

20          MR. FLENTJE: I mean, we're not going to get in a big  
21          fight over the difference between Thursday which is 14 days for  
22          the original and Monday which is 14 days for the expanded group  
23          so I think it would just make more sense to treat the Monday,  
24          you could certainly expand it to that group on Monday for the  
25          TRO. I mean, that, you know, I'm not sure I would like the

1 Court to say we consent to that, but I think, you know, using  
2 the Monday date as the end of the 14 days makes sense.

3 THE COURT: Okay.

4 MR. FLENTJE: I mean, the only other thing I would  
5 want to mention is some of the access to counsel issues and,  
6 you know, these are important issues, but I do want the Court  
7 to understand and just to explain a few things. Obviously the  
8 potential class members here have had removal orders often for  
9 some time, although I do have some stats on that if the Court's  
10 interested. They've been able to challenge those orders  
11 throughout, so, you know, a lot of their evidence is about  
12 conditions worsening in 2014. They've had an ability to  
13 challenge those removal orders or raise a CAT-type claim or a  
14 withholding-type claim since that time and, you know, that's,  
15 so that's, they've had a significant time to address some of  
16 the changed circumstances in Iraq and of course, you know,  
17 since January, the president issued some executive orders  
18 saying that he's going to try to work hard on getting countries  
19 who aren't cooperating on taking people back to agree to take  
20 them back. Iraq is one of those countries where it's been hard  
21 and obviously said the criminal aliens were a removal priority,  
22 so there have been certainly warning signs that it's time to  
23 sort of take action to re -- if petitioners want to reconsider  
24 the removal orders, that they should do so and so I don't think  
25 we should think of sort of the moment that ICE began the

1           detention as the sort of first chance they had to think about  
2       these issues and to consider whether, you know, having this  
3       pending removal order is something that they need to work on  
4       and try and address if they're concerned about conditions in  
5       Iraq.

6           I'd also say that, you know, the -- they've cited  
7       some cases about moving detainees around. These are cases from  
8       awhile ago and ICE has vastly changed -- I mean, a generation  
9       ago. ICE has vastly improved their detention standards since  
10      those days. I'll give you an example. There's telephone  
11      access almost all day at the Youngstown facility. There is  
12      definitely opportunity to reach out to counsel. There are pro  
13      bono providers lists available and so the -- I don't think it's  
14      fair to sort of look at those cases from a generation ago and  
15      think that provides much guidance on the counsel issues today  
16      and I'll also say that, you know, facility issues require  
17      moving people from time to time and that sort of movement  
18      shouldn't be viewed as a violation of the right to counsel.

19           The other, the last two things I'd say and this sort  
20      of relates to discovery is the staleness of removal orders.  
21      Nationwide we got some data and it looked like around 20  
22      removal orders, these are for the folks that are detained,  
23      around 20 are from prior to 2000 and around 196 are from after  
24      2000 and so some of their named plaintiffs, named petitioners  
25      do have old removal orders, but they're not all old in that

1 sense and around 84 of them are from around 2010 to the present  
2 so, you know, during the period where there would have been  
3 definitely an opportunity to raise questions about, you know,  
4 the conditions in Iraq at the time they were entered.

5 I'd also note that I've got information that since  
6 2014, 163 people have been removed to Iraq so this is not  
7 something that has never happened. Recently, you know, we've  
8 gotten more cooperation recently, but there are removals to  
9 Iraq ongoing in every year, recently a toll of 325 since 2010.

10 I'd like to address one more thing on the discovery  
11 and that's the scope of discovery. If this Court is going to  
12 order discovery, we think it should be limited. We oppose --  
13 obviously we don't think discovery is necessary now and we  
14 don't think plaintiffs have provided good cause why they need  
15 it for their PI motion, but if the Court were to order  
16 discovery, we really think it needs to be limited to the  
17 detained population which is a round 220 people. Those are the  
18 folks presenting kind of the emergent situation that plaintiffs  
19 have identified.

20 We also think that it should be limited to sort of  
21 identification information. Issues about representation or  
22 about filings that they've made is something that should come  
23 from the individuals themselves, not from the government and in  
24 addition, you know, some of the information they have listed is  
25 actually a significant burden to gather. Some of it is only

1 available in paper files. So if this Court's inclined to order  
2 discovery, we'd hope there'd be a little flexibility and that  
3 we would work with plaintiffs to talk about exactly what  
4 information is really critical in a short period of time.

5 THE COURT: What's your best estimate as to how long  
6 it would take the government to assemble all the information  
7 that plaintiffs are asking for?

8 MR. FLENTJE: All of the information?

9 THE COURT: Yes.

10 MR. FLENTJE: I think I'd have to get an answer from  
11 ICE. I think they could -- as I've narrowed it, I think they  
12 could get it pretty quickly because it's available on  
13 databases. If you're talking about paper files for 1,500  
14 people, that will take a significantly longer period of time  
15 and some of the information they've requested is information  
16 that we'd have to go to I think the immigration courts to  
17 obtain rather than ICE having ready access to it.

18 THE COURT: That's whether they've filed motions  
19 already?

20 MR. FLENTJE: Like whether they've made certain  
21 filings and whether someone's filed a representation for them  
22 in the immigration courts. That's all -- I mean, ICE may have  
23 some of it, but I'm not sure that I can say it's as reliable in  
24 ICE's possession as it would be with the immigration courts and  
25 the fact, the one thing on here, criminal history, that is,

1       umm, I'm not sure that data's collected in a manner. I mean,  
2       there will be sort of if it's a criminal grounds for removal,  
3       that would be identified in the removal order, but as far as  
4       criminal history without further definition, that could mean a  
5       lot of things and ICE wouldn't have that information  
6       necessarily. It may have for some, but it certainly does not  
7       collect all criminal history and that's not their role. So  
8       things like the name, date of birth, alien number and location  
9       are things that could be quickly obtained for the detained  
10      population. I'm happy to answer questions, but I think those  
11      are the main points I wanted to make on the motions.

12                   THE COURT: One question, I just want to understand  
13       your view of the time table. Obviously if I agree with the  
14       government's position on jurisdiction, that would be the end of  
15       the current stay, I would terminate it. If I agree with the  
16       plaintiff's view on jurisdiction, their next step in the  
17       process is a preliminary injunction and understanding the  
18       government's preference, the government would prefer not to  
19       turn over anything until the Court rules on jurisdiction so  
20       that ends up elongating our process somewhat. Is it your view  
21       that a temporary restraining order couldn't go beyond July 24th  
22       unless it was replaced by a preliminary injunction at that  
23       point? In other words, would we have to finish discovery phase  
24       and the preliminary injunction briefing and the hearing and my  
25       ruling? That doesn't sound the way that -- I know that's not

1       the way that we do it in other cases. Once a TRO is entered,  
2       we often have a period of discovery which sometimes lasts  
3       months and then we have a preliminary injunction hearing that  
4       may also take awhile to get set up following briefing, but I  
5       want to understand what the government's view of that is.

6                   MR. FLENTJE: And our view is under Rule 65, it says  
7       a TRO is for 14 days and for good cause it can be extended  
8       another 14 days. An order that extends past that, whatever  
9       it's called, would operate as a preliminary injunction and  
10      would be subject to appeal. I mean, that doesn't mean there's  
11      going to be an appeal, but, you know, that, I mean, if you  
12      think about it, the whole point of allowing an appeal -- I  
13      mean, that's what -- it's only important to the appeal issue  
14      and the point of allowing an appeal of a preliminary injunction  
15      is you're going to have an order limiting conduct of the  
16      government or whoever is the defendant, that's a significant  
17      imposition and if that's going to go on beyond 28 days, the  
18      rules make it quite clear that that is something that is  
19      subject to appeal. So I'm not surprised that there have been  
20      arrangements either by agreement to like let things go out a  
21      little longer or, you know, the defendant has just decided this  
22      is not the best time to appeal, there's, you know, let's build  
23      the case a little bit, the harm is not that great. I mean, the  
24      appeal standard is, you know, showing irreparable harm, so I  
25      would guess a lot of factors play into the fact that sometimes

1 it lasts longer than 28 days, but, you know, by the rules, you  
2 know, there's an appeal available in our view on day 29.

3 THE COURT: I understand, okay.

4 MR. FLENTJE: Thanks.

5 THE COURT: Thank you. Reply?

6 MS. SCHLANGER: Thank you, your Honor. Umm, I don't  
7 think -- we don't agree that Rule 65 is nearly as clear as the  
8 government just said. The rule by its terms talks about  
9 temporary restraining orders issued without notice so it  
10 doesn't by its terms exactly apply. There -- it's certainly  
11 the case that if you extended a TRO indefinitely for example it  
12 would become an appealable PI. We're not asking you to do that  
13 and we don't think on day 29 it becomes appealable. We've  
14 cited you to, for example, a case that Judge Edmunds issued  
15 about a year ago, United Naturals v. LXR Biotech. That's in  
16 docket 50, Exhibit C and what she did there was she held an  
17 expeditious PI hearing and things extended a few days past the  
18 28 days, so we think you have ample authority to do that and  
19 for it to remain a TRO while you do that and perhaps we could  
20 all work out a briefing schedule and if you extent TRO, we're  
21 willing to agree on a kind of orderly way to do this, but in  
22 any event we think you have authority to do that.

23 In addition, if you wanted to issue just a clean  
24 jurisdictional order and that order became appealable, well,  
25 you know, and then we, we put a PI kind of into the future and

1       we ask you for a stay pending that appeal, you know, those are  
2       things, I mean, as you said the decision tree gets pretty  
3       complexed, but we could figure something out along these  
4       lines.

5                  On the merits, I think much of what Mr. Flentje was  
6       just presenting to you was merits arguments that could used to  
7       be entertained more fully in a PI, so he told you that 93 of  
8       the 220 detainees have filed motions to reopen. He told you  
9       about how many were before 2000 and how many were after. He  
10      didn't tell us how many were before 2014 which is kind of the  
11      trigger date for these, for a lot of these changed conditions,  
12      but there are some issues that we could try to develop if we  
13      get the discovery that we're asking for and obviously people  
14      who have counsel, but their counsel haven't been able to talk  
15      to them, that's not -- they're not in a very good position yet  
16      to file an MTR. We are as until the declaration on the earlier  
17      papers demonstrated really working hard to get people counsel,  
18      to get all of this up and running and we think that that, that  
19      they need the protection of the stay of removal while that  
20      process works.

21                  THE COURT: Well, what about the carve-outs the  
22       government was talking about, anyone who has an attorney or  
23       anyone who's filed a motion for reopening? Should those people  
24       be excluded from the class?

25                  MS. SCHLANGER: No, we don't think so. There's a

1       little bit of a chicken and egg problem I want to admit it  
2       because the immigration courts won't grant stays while this  
3       Court's stay is in effect and so we don't really know whether  
4       the immigration courts would grant a stay in some of those  
5       cases, but the fact is that if they don't have a stay, then  
6       their motion to reopen isn't going to get heard and they don't,  
7       they don't have stays and so it doesn't do them any good to  
8       have filed a motion to reopen if the status quo doesn't get  
9       protected while that motion gets adjudicated. That doesn't  
10      take very long, but it hasn't happened yet. Certainly the  
11      people who have counsel, but counsel haven't yet been able to  
12      file a motion to reopen, that's a matter of a very short time,  
13      but they are not yet able to, umm, to get this process up and  
14      running.

15           One final issue about discovery which is that the  
16      people facing removal file a form with ICE about representation  
17      and that, so we're not actually asking if they are represented  
18      in immigration court, we're asking for that information which  
19      is entirely in ICE's possession. We're asking for the  
20      information on counsel that ICE knows about. I think that's  
21      all I have, your Honor.

22           THE COURT: Well, you're saying the immigration  
23      courts won't act on a motion for stay while this Court's stay  
24      is in effect.

25           MS. SCHLANGER: Right.

1                   THE COURT: So aren't we going to have this gap  
2 problem if I agreed with you, your theory is these class  
3 members need to have an opportunity to file a motion to reopen  
4 which they can't do unless they file a motion for a stay? Is  
5 is that right?

6                   MS. SCHLANGER: No, no. They can file a motion to  
7 reopen without a stay.

8                   THE COURT: All right. They just can't file a motion  
9 for a stay while my stay pending.

10                  MS. SCHLANGER: They can file it, but it won't get  
11 adjudicated.

12                  THE COURT: It won't get adjudicated, all right.

13                  MS. SCHLANGER: They can and have filed it just to be  
14 clear. A lot of them have filed motions to stay, but  
15 currently most of the immigration courts are not acting -- it  
16 appears, right? I mean, we can't really tell, but it appears  
17 that most of the immigration courts are not acting on those  
18 stay requests because they only act on them when deportation is  
19 imminent and they say well it's not imminent enough because  
20 there's this district court's stay.

21                  THE COURT: Well, then why don't you fine tune for me  
22 when you think my stay should expire as to any particular class  
23 member. We've talked in kind of general terms that your  
24 position is they should have a reasonable opportunity to file a  
25 motion for reopening I suppose and a motion for a stay in the

1 immigration court, right?

2 MS. SCHLANGER: Yes.

3 THE COURT: Both of those. So what does that mean as  
4 a practical matter?

5 MS. SCHLANGER: Right. So this, too, is something  
6 that we were hoping to develop further in the preliminary  
7 injunction papers, but at the very least they should be able to  
8 get their motion to reopen adjudicated. That's a matter of,  
9 it's, so I mean when we file for a PI, we were going to ask you  
10 for an amount of time that was enough to do that and that's  
11 typically six weeks or two months.

12 THE COURT: So for the entire class you're saying you  
13 would be asking me to set an outside limit the stay would  
14 expire two months after issuance, something like that?

15 MS. SCHLANGER: I confess it's making my nervous to  
16 commit this when I was hoping to brief it in the PI and have --

17 THE COURT: All right. Well, I won't hold you to it.  
18 I'm just trying to explore this because I'm hearing from the  
19 government about how they want to carve out certain things,  
20 you're coming back and telling me you're not agreeable to those  
21 carve-outs. So now I need to know a little bit more about what  
22 exactly is the stay that you're asking for. If you're just  
23 saying on the one hand you don't want me to enter anything  
24 that's indefinite and at the same time you're saying you want  
25 to elaborate on this in your motion for preliminary injunction,

1       then I'm not sure what it is you're asking me to do at this  
2       point.

3                  MS. SCHLANGER: For right now we're asking you to  
4       preserve the status quo pending the adjudication of the PI and  
5       we think that can be done in the matter if not absolutely dead  
6       set fully adjudicated by the 24th, in a very expeditious matter  
7       after that once we set a briefing schedule which the government  
8       has said they're, you know, kind of willing to talk to us about  
9       and so on so we're not talk about a very long period of time.  
10      When we come back to you with the PI, we'll have a full ask  
11      about these people.

12                 The reason I'm so hesitant and the reason I'm not, in  
13       ordinary circumstances that kind of time would be enough. If  
14       people are, for example, in a detention facility which has  
15       taken away their phone access which is the fact for a number of  
16       the class members right now. Now I don't know if that a phone  
17       access is going to come back, but right now we have to talk to  
18       them only in person in Arizona. If that continues to be the  
19       case and their lawyers can only talk to them in person in  
20       Arizona, things get stretched out and it's just very hard for  
21       me to tell you right now, like I know what this usually looks  
22       like, but it's hard for me to tell you right now oh, give us X  
23       number of days and we're good because it depends on those kinds  
24       of facts on the ground whether or not they actually have access  
25       to a meaningful hearing in a meaningful time and that's

1 standard under the due process clause, but I'm not trying to be  
2 evasive. We're going to, umm, we're going to come back to you  
3 with something much more definite, but for today what we're  
4 asking for is a stay not for an indefinite amount of time, but  
5 just until you have time to adjudicate that PI which is a  
6 matter of if not and today's the 5th, if not only until the  
7 24th, very expeditiously right after that and in agreeable  
8 schedule.

9 THE COURT: Okay. All right, anything else? Does  
10 the government have anything else?

11 MS. SCHLANGER: Thank you, your Honor.

12 MR. FLENTJE: I don't think I have anything else. I  
13 do want to say that we're not sure that this counsel form that  
14 ICE has is readily available or easily available and I'm not  
15 sure it's going to provide the best information on whether  
16 there's actually representation. I understand the Board is  
17 still acting on stays although I don't know what that  
18 information comes from.

19 You know, I point out they said they needed six weeks  
20 to two months at the first hearing and it's now been, umm, I  
21 think a while since then so I hope you consider that in  
22 deciding how much time to give them although it sounds like  
23 that's coming later.

24 If there is an order, you know, there are some people  
25 who actually prepared to go home to Iraq and I don't know how

1 to handle those, but we've, we have one letter that we got from  
2 someone who wants out of the class so that they can travel so  
3 they can go home. You know, not everyone presents the same  
4 circumstances as some of the plaintiffs or excuse me, the named  
5 petitioners and as I'd said, there have been removals for Iraq,  
6 to Iraq ongoing every year for a while.

7 I don't know anything about this phone access issue,  
8 but I do stress that the detention standards provide for phone  
9 access. It is readily available and, you know, I'll reiterate  
10 this is not kind of similar to what was going on in the  
11 mid-'80s when courts intervened on counsel access issues.  
12 That's it.

13 THE COURT: All right. I know that these issues have  
14 been coming up at a pretty quick pace and I take it there may  
15 not have been full discussion between both sides here. Would  
16 it be helpful for you to sit down right now to talk to each  
17 other about any of these issues regarding discovery or access  
18 to information or anything like that? Would any of that be  
19 helpful?

20 MR. FLENTJE: I mean, we can. My, I mean, the  
21 government has a lot of players and it's, you know, it's very  
22 hard for me to have sort of answers or be able to make  
23 decisions on some of these issues without consulting with  
24 clients and a lot of players who are very interested in this  
25 litigation, so, umm, I mean, I'm happy to talk, but that's --

1 it's probably a talk that will result in me taking ideas back  
2 to Washington.

3 THE COURT: All right. Well, let me ask plaintiffs.  
4 Would there be any value to sitting down and seeing if any of  
5 these logistical issues could be worked out?

6 MS. SCHLANGER: Yeah, we would be very happy to do  
7 that, your Honor.

8 THE COURT: All right. I can make my jury room  
9 available to you if you want to sit down and see if any of that  
10 would be something that could be addressed. I understand you  
11 may not be able to reach any final decision about anything, but  
12 sometimes talking through issues does actually produce results.  
13 Happens all the time in this courthouse, so if you'd like to do  
14 that, my clerk, Mr. Ping, will escort you to the jury room if  
15 that's where you'd like to meet or you're free to meet anywhere  
16 else you might want to meet. Anything else for the record at  
17 this point?

18 MS. SCHLANGER: No. Thank you, your Honor.

19 MR. FLENTJE: No, your Honor. Thank you.

20 THE COURT: Okay, thank you. All right. One  
21 housekeeping matter before we sign off, the Court had sent out  
22 an order regarding public access giving a time frame for any  
23 objections. Nothing's been submitted on the docket. Just want  
24 to make sure everyone is in agreement with that or has  
25 something that's been submitted not on the docket?

1 MS. SCHLANGER: We have shared with the clerk's  
2 office, right?

3 MS. SCOTT: Your Honor, we had submitted a letter to  
4 your chambers with proposed redactions and categories of  
5 redactions we would like if the file is made publicly  
6 available. If you would like me to file that, I can do that as  
7 well.

8 THE COURT: Well, I think you should unless, is there  
9 something that's confidential in the letter itself?

10 MS. SCOTT: Umm, I don't believe so.

11 THE COURT: All right. Now you said it went to  
12 chambers?

13 MS. SCOTT: It did.

14 THE COURT: When was that?

15 MS. SCOTT: We delivered a copy, it was close to  
16 4:30 on the day that it was due. I can send another copy to  
17 your chambers if you'd like.

18 THE COURT: Okay, would you?

19 MS. SCOTT: Yes.

20 THE COURT: I will check on that, but is that only  
21 questions regarding redaction as opposed to access?

22 MS. SCOTT: It's only redactions. We don't object  
23 to access as long as we have the ability to redact some  
24 personal information.

25 THE COURT: Sure, okay.

1                   MS. SCHLANGER: And we would ask also there's a  
2 couple of items that the government has filed that we would ask  
3 that they would redact correspondingly that have some personal  
4 information about our clients.

5                   THE COURT: Okay. Well, we can deal with the  
6 redactions, but as far as the government's concerned, opening  
7 up to public access like other files, is there any objection to  
8 that?

9                   MR. FLENTJE: No, no objections as long as we can do  
10 the redactions.

11                  THE COURT: Okay. Anything else? Then we are  
12 adjourned. Thank you.

13                  (Hearing concluded at 12:39 p.m.)

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7                   I, David B. Yarbrough, Official Court  
8 Reporter, do hereby certify that the foregoing pages  
9 comprise a true and accurate transcript of the  
10 proceedings taken by me in this matter on Wednesday,  
11 July 5th, 2017.

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7/6/2017

/s/ David B. Yarbrough

17

Date

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